



Australian  
Competition &  
Consumer  
Commission

# **Draft determination**

## **Patrick Stevedoring Pty Ltd, Port Adelaide**

**Exemption assessment of a bulk wheat port  
terminal facility under the Port Terminal  
Access (Bulk Wheat) Code of Conduct**

**25 February 2016**

# 1. Introduction

The Australian Competition and Consumer Commission (ACCC) has made a draft determination that Patrick Stevedoring Pty Ltd. (Patrick) should be an exempt service provider of port terminal services at Berth 29, Port Adelaide.

This draft determination relates to an exemption under the Port Terminal Access (Bulk Wheat) Code of Conduct (the Code). The Code was made under section 51AE of the *Competition and Consumer Act 2010* (Cth) (CCA). It commenced on 30 September 2014 and regulates the conduct of bulk wheat port terminal service providers (PTSPs). For PTSPs that were not required to have access undertakings under the previous regime (including Patrick), the obligations in the Code applied from 1 October 2015.<sup>1</sup>

If the ACCC makes a final determination consistent with this draft determination, Patrick will only be subject to Parts 1 and 2 of the Code. Exempt service providers face a lower level of regulation as they are not required to comply with Parts 3 to 6 of the Code.

The ACCC's reasons for making this draft determination are set out at section 2 of this document.

## Consultation on this draft determination

The ACCC is seeking views on its draft determination that Patrick should be an exempt service provider of port terminal services at its Berth 29, Port Adelaide facility. The ACCC welcomes views on all aspects of its draft determination.

Submissions are due by 5:00pm EST on **10 March 2016**. If a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension. Further information on how to make a submission is in the Appendix.

## 1.1. Exempt service providers

Exempt service providers are still obliged to comply with Parts 1 and 2 of the Code. These parts of the Code place a number of obligations on service providers including requirements to deal with exporters in good faith and publish information about how demand for capacity is allocated and the current shipping stem. Exempt service providers must also comply with general competition law.

Exempt service providers are not required to comply with Parts 3 to 6 of the Code which means they are not required to, among other things:

- provide access according to the non-discrimination and no hindering obligations contained in the Code
- resolve access agreement negotiation disputes through the Code-prescribed dispute resolution process, which includes arbitration
- have their capacity allocation system approved by the ACCC if it allocates capacity more than 6 months into the future
- publish information about expected port capacity, performance indicators and stocks as required under part 5 of the Code.

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<sup>1</sup> See subclause 4(6) of the Code.

The ACCC can determine a PTSP to be an exempt service provider under subclause 5(2) of the Code. In deciding whether or not to determine a PTSP is an exempt service provider, the ACCC must have regard to the matters listed at subclause 5(3) of the Code:

- (a) the legitimate business interests of the port terminal service provider;
- (b) the public interest, including the public interest in having competition in markets;
- (c) the interests of exporters who may require access to port terminal services;
- (d) the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services;
- (e) the promotion of the economically efficient operation and use of the port terminal facility;
- (f) the promotion of efficient investment in port terminal facilities;
- (g) the promotion of competition in upstream and downstream markets;
- (h) whether the port terminal service provider is an exporter or an associated entity of an exporter;
- (i) whether there is already an exempt service provider within the grain catchment area for the port concerned;
- (j) any other matters the ACCC considers relevant.

The ACCC's assessment of Patrick's Berth 29, Port Adelaide facility against each of these matters is set out in section 2 of this document.<sup>2</sup>

## **Exemption granted to CBH by the Minister for Agriculture**

The Minister for Agriculture may also determine that a PTSP is an exempt service provider if the PTSP is a cooperative meeting certain criteria set out in subclause 5(1) of the Code. The ACCC does not have any role in exemptions for cooperatives under subclause 5(1).

On 17 November 2014, the Minister for Agriculture determined that Co-operative Bulk Handling Limited (CBH) is an exempt service provider at its Albany, Esperance, Geraldton and Kwinana port terminal facilities. Accordingly, CBH is not required to comply with Parts 3 to 6 of the Code when providing port terminal services from those facilities.

## **1.2. Exemption application by Patrick**

In January 2016, Patrick wrote to the ACCC seeking to be determined an exempt service provider of port terminal services for bulk wheat exports at Berth 29, a common user wharf facility at Port Adelaide.<sup>3</sup> Patrick has a non-exclusive stevedore licence in place with Flinders Ports, which includes Berth 29.<sup>4</sup>

Patrick has recently entered into an agreement with Cargill to stevedore grain at Berth 29. Patrick expects to load for Cargill approximately 225,000 tonnes per year, which equates to

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<sup>2</sup> Further details about the ACCC's process for making and revoking exemption determinations under the Code are in the ACCC's guidelines, available at <http://www.accc.gov.au/regulated-infrastructure/wheat-export/accc-role-in-wheat-export>.

<sup>3</sup> Berth 29 is a shared products berth primarily used for bulk products including Mineral Sands, Sulphur, Zinc and Copper concentrates as well as Scrap Metal. Patrick Exemption Application - public version, p.11.

<sup>4</sup> Patrick Exemption Application - public version, p.8.

8-10 ships a year. The vessels will be loaded using Patrick labour, Cargill's hopper and Patrick's ship loader.

The exemption application is available on the ACCC's website at <https://www.accc.gov.au/regulated-infrastructure/wheat-export/patrick-port-adelaide-wheat-port-exemption-assesment>

### 1.3. Further information

If you have any queries about any matters raised in this document, please contact:

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## 2. ACCC assessment having regard to the matters in subclause 5(3) of the Code

This section sets out the ACCC's assessment, having regard to the matters at subclause 5(3) of the Code, of whether it should determine Patrick to be an exempt service provider at the Berth 29, Port Adelaide facility.

### 2.1. Legitimate business interests of Patrick

Subclause 5(3)(a) of the Code requires the ACCC to have regard to the PTSP's legitimate business interests in deciding whether to grant an exemption.

Patrick submits that:

Granting the exemptions will reduce Patrick's costs and improve its flexibility in meeting customer demands and encourage small scale entry into the grain supply chain.<sup>5</sup>

The ACCC also considers that exempting Patrick at Port Adelaide would:

- increase its operational flexibility
- reduce its Code compliance costs, particularly noting that Patrick is currently not regulated under the Code and would otherwise be required to develop an entirely new compliance program.

The ACCC considers it is generally in a PTSP's legitimate business interests to reduce (or not impose additional) regulatory compliance costs and maintain operational flexibility.

As such the ACCC's draft view is that exempting Patrick at Port Adelaide would be in its legitimate business interests. The ACCC considers that the legitimate business interests of

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<sup>5</sup> Ibid, p.14.

Patrick should be considered against the reasons for having regulation in place and the level of competitive constraint faced by Patrick. The level of competitive constraint faced by Patrick and other matters relevant to an exemption are considered further below at sections 2.2-5.

## 2.2. The public interest and competition in markets

In deciding whether to grant an exemption, subclauses 5(3)(b) and (g) of the Code require the ACCC to have regard to the public interest, including the public interest in having competition in markets, and the promotion of competition in upstream and downstream markets. Subclause 5(3)(i) also requires the ACCC to have regard to whether there is already an exempt service provider within the grain catchment area for the port concerned.

The ACCC considers these matters all relate to the degree of competitive constraint faced by the PTSP in the provision of port terminal services, and the likely effect of an exemption on competition in bulk wheat port terminal services and related markets.

As outlined in its submission, Patrick currently has an agreement with Cargill to provide bulk wheat port terminal services. Under the arrangement Cargill will source grain from both its own GrainFlow storage network and the Viterra storage network.

Patrick submits the expected load at the port of 225,000 tonnes per year represents about 3.5 per cent of the average annual South Australian grain production, meaning Viterra will still handle approximately 97 per cent of the South Australian grain port throughput.<sup>6</sup>

Patrick submits an exemption will reduce the regulatory burden on Patrick and increase competition in the delivery of services in the wheat supply chain.<sup>7</sup> Patrick also submits 'it is providing entry and competition into a market dominated by a single player'.<sup>8</sup>

Prior to Patrick commencing operations at Port Adelaide, Viterra was the only provider of bulk wheat port terminal services in South Australia (SA). Though the ACCC notes another firm has trialled bulk wheat exports from Port Adelaide.

In its submission, Patrick submits that over 2 million tonnes of bulk grain was exported from Port Adelaide and over 1.7 million tonnes of bulk grain was exported from Port Lincoln.<sup>9</sup> This data is consistent with the information included in the recent ACCC Final Decision on Viterra's Long Term Agreement proposal, noting that Patrick's data has combined the two Viterra Port Adelaide operations.

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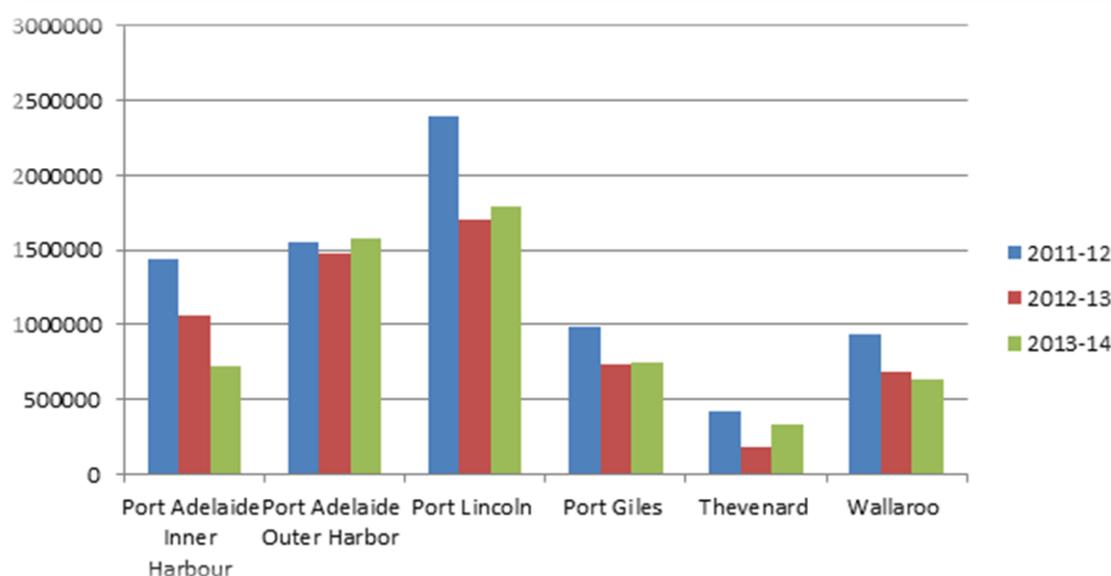
<sup>6</sup> Ibid, p.8.

<sup>7</sup> Ibid, p.14.

<sup>8</sup> Ibid, p.3.

<sup>9</sup> See Figure 5: Export Bulk Grain by Port Tonnes Calendar Year 2014 at Patrick Exemption Application - public version, p.7.

**Chart 1: Total tonnage exported by SA port terminal, 2011-12 to 2013-14**



Source: Shipping stem data provided by Viterra.<sup>10</sup>

The Patrick / Cargill arrangement may also increase competition in the related grain trading and grain storage markets. Growers situated within proximity to relevant Cargill sites may secure more attractive prices than other growers who can only access a Viterra upcountry storage facility.

Overall, Viterra will remain the dominant operator in upcountry storage and handling across SA. AEGIC notes that Viterra receives up country 80 per cent of export grain in SA across its 92 (including 3 in Victoria) receival sites.<sup>11</sup> Exporters seeking to export bulk grain from SA will for the most part continue to have limited choice when deciding from where to ship bulk grain.

The ACCC considers that the Patrick operation will provide some growers increased trading opportunities through exposure to a competing supply chain in SA.

The ACCC notes, however, that the overall amount of grain to be exported via Patrick is small relative to the amount of grain exported through the adjacent Port Adelaide Viterra ports. As noted above, Patrick expects to load 225,000 tonnes per year for two years, which equates to around 8-10 ships a year.<sup>12</sup>

The ACCC's draft view is that exempting Patrick at Port Adelaide is in the public interest and will not be detrimental to competition in markets because:

- Viterra is currently the dominant provider of port terminal services in SA. The Patrick operation should promote competition in a market (and related markets) where Viterra is dominant.
- In the absence of full regulation under the Code, Patrick will continue to face a significant competitive constraint from Viterra's facilities, especially from the port terminals at Port Adelaide. Patrick is therefore very unlikely to be able to exert market power in the provision of port terminal services.

<sup>10</sup> ACCC, Viterra application seeking capacity allocation system approval Final decision, 3 December 2015, p.92.

<sup>11</sup> AEGIC report, Supply Chains Report, 2014, p. 11.

<sup>12</sup> Patrick Exemption Application - public version, p.8.

- There is currently little competition in upstream markets, granting an exemption to Patrick may promote competition in both grain trading and/or grain storage particularly where Cargill operate storage facilities.

The ACCC’s consideration of these matters supports granting an exemption to Patrick at Berth 29, Port Adelaide.

### 2.3. Interests of exporters and access to port terminal services

In deciding whether to exempt a PTSP, subclause 5(3)(c) and (d) of the Code requires the ACCC to have regard to the interests of exporters who may require access to port terminal services and the likelihood that exporters of bulk wheat will have fair and transparent access to port terminal services.

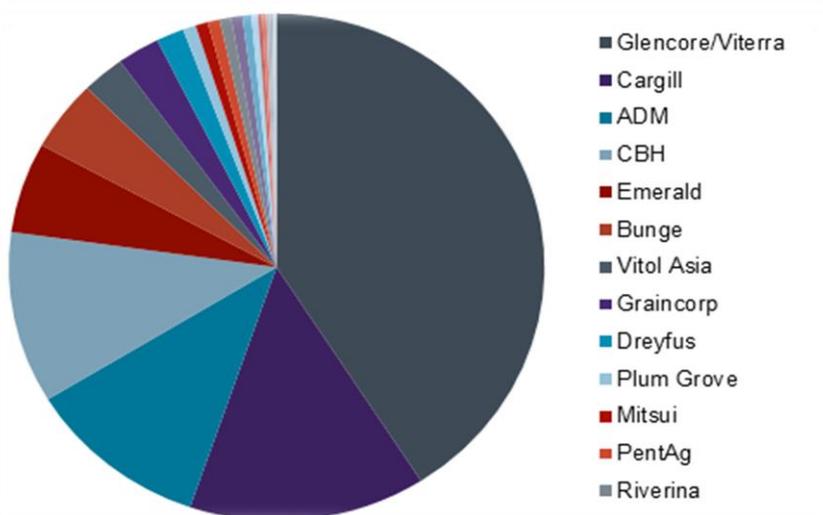
This is also related to subclause 5(3)(h) of the Code, which requires the ACCC to have regard to whether the PTSP is an exporter or an associated entity of an exporter. If a PTSP is vertically integrated in the export market it may favour its own trading division to the detriment of other exporters seeking access to port terminal services.

In relation to then interests of exporters, Patrick submits:

By reducing the regulatory burden on Patrick this will encourage small scale entry allowing exporters to benefit from increased choice of service provider and the increased service quality and price constraints that competition provide.<sup>13</sup>

The ACCC considers that the interests of Cargill, as an exporter who has an agreement with Patrick for port terminal services, are relevant to this exemption assessment. The interests of exporters other than Cargill are also relevant, and are discussed below.

**Chart 2: Total SA Exports by Exporters, 2011-12 to 2014-15 (to July 2015)**



Source: Australian Crop Forecasters

Historically, Cargill has been a significant exporter from SA. However, in recent years, their share of overall exports from SA has declined.<sup>14</sup> To date, Cargill already has numerous

<sup>13</sup> Ibid, p.14.

shipping commitments on the Viterra shipping stem for 2016. Access to the Patrick facility should provide additional shipping options for Cargill, including the possibility of two port loadings.

In relation to access more broadly, Patrick submits the operation does not lend itself to scalability, but:

... it is open to providing these services to other customers but this would be subject to: the availability of the ship loader; the availability of Berth 29 and the customer being able to supply hopper equipment that is compatible with Patrick's ship loader and meets Flinders Ports' requirements particular in relation to dust control.<sup>15</sup>

Further to the requirements for access set out by Patrick, it is also not clear if other exporters would or could replicate the arrangement that Cargill has in place for grain origination. It is not clear if other exporters could efficiently outturn from either Cargill's GrainFlow facilities and/or Viterra's upcountry network. In addition, Viterra's Export Select product and associated rebate may prove a further disincentive to use the Patrick facility.

Cargill may decide to provide receival and storage services to third party exporters for the purposes of exporting grain from Berth 29. Given that it is not vertically integrated with Cargill, Patrick is unlikely to have incentives to discriminate or hinder access when providing ship loading services if third party exporters are able to obtain the requisite access to Cargill's receival and storage services. In these circumstances, requiring Patrick to provide access to third party exporters in accordance with the full obligations in the Code is likely to be of limited practical benefit.

The ACCC considers that granting an exemption to Patrick at Port Adelaide is likely to be in the interests of Cargill. The development also provides other third party exporters additional choice in the bulk grain export market, subject to satisfying the precursors to access identified by Patrick. In addition, both growers and other exporters obtaining access to Cargill's storage facility may also benefit from the Patrick port arrangement.

The ACCC also considers that deciding not to grant an exemption and applying the full level of regulation under the Code to Patrick is likely to provide little practical benefit to other potential access seekers.

## **2.4. Economically efficient operation and efficient investment**

In deciding whether to exempt a PTSP, subclause 5(3)(e) and (f) of the Code requires the ACCC to have regard to the promotion of the economically efficient operation and use of the port terminal facility and efficient investment in port terminal facilities.

Patrick submits:

By reducing the regulatory burden on Patrick this will encourage small scale entry and increase competition in the delivery of services in the wheat supply chain. This increased competition will encourage efficient operation and use of the terminal facilities.<sup>16</sup>

Granting Patrick an exemption will mean that its compliance related operating costs will be lower and it will have greater operational flexibility, which will likely promote the efficient operation of the Berth 29 facility for bulk grain exports.

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<sup>14</sup> ACCC, Viterra application seeking capacity allocation system approval Draft decision, 16 July 2015, Appendix A

<sup>15</sup> Patrick Exemption Application - public version, p.11-12.

<sup>16</sup> Ibid, p.14.

The ACCC also recognises that unnecessary regulation may discourage investment in port terminal facilities. The ACCC considers that the competitive discipline provided by Viterra will be sufficient to encourage Patrick to make efficient investments, and deter inefficient investment, in its facility.

An exemption may also create incentives for Viterra to make efficient investments in its port terminal facilities, in order to compete with Patrick (to the extent that the Patrick operation will provide competitive tension), at port and/or in related markets.

The ACCC's draft view is that exempting Patrick at Berth 29, Port Adelaide will promote the economically efficient operation of and use of its facility, and the efficient investment in port terminal facilities.

## 2.5. Other matters

The ACCC does not consider that there are any other matters relevant to its assessment of an exemption for Patrick at Port Adelaide in accordance with subclause 5(3)(j) of the Code.

## 3. Monitoring

Having considered the matters under subclause 5(3) of the Code, including the level of competition Patrick currently faces, the ACCC has formed the draft view that Patrick should be exempt from Parts 3 to 6 of the Code. However, the ACCC recognises that it is not possible to ensure particular market outcomes following an exemption decision. Similar to the ACCC's approach to monitoring the level of competition following exemption determinations regarding port terminals in other port zones, the ACCC also considers it appropriate for it to monitor the bulk wheat terminals in SA.

The ACCC intends to pursue two main monitoring activities:

- *Industry analysis* – this may include examining the shipping activity at each SA port terminal. All PTSPs publish and provide to the ACCC ship loading statements under Part 2 of the Code.
- *Industry consultation* – this may include periodically approaching industry participants, such as exporters and farmer groups, to gauge the effect of the exemptions. Industry participants are also encouraged to approach the ACCC directly with any concerns they may have in securing fair and transparent access to SA bulk wheat port terminals.

The ACCC would be concerned if its monitoring revealed a reduction in the level of competition either across SA or within specific grain catchment areas. This may include significant increases in market concentration in the grain export market that may reduce the level of competition for grain grown by Australian farmers.

Under subclause 5(6) of the Code, the ACCC can revoke an exemption determination it has made if, after having regard to the matters in subclause 5(3), it is satisfied that the reasons for granting the exemption no longer apply.

Further details about the type of monitoring the ACCC will undertake following an exemption determination is available in the final determinations on the Port of Newcastle, available on the ACCC's website at <http://www.accc.gov.au/regulated-infrastructure/wheat-export/newcastle-wheat-ports-exemptions-assessments-nat-and-qube>.

## 4. Draft determination

The ACCC has made a draft determination that Patrick should be an exempt service provider of port terminal services at its Berth 29 facilities, Port Adelaide.

## Appendix: Making a submission

The ACCC invites public submissions on the draft determination set out in this document. Please include detailed reasons to support the views put forward in submissions.

Submissions should be addressed to:

General Manager  
Infrastructure & Transport – Access & Pricing Branch  
ACCC  
GPO Box 520  
Melbourne VIC 3001

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

Submissions are due by 5:00pm EST on **10 March 2016**. The ACCC recognises this is a relatively short consultation period, and if a party intends to make a submission and is concerned about meeting this timeframe they may contact the ACCC before the due date to discuss an extension.

### Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then conduct its assessment in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the *ACCC & AER Information Policy – collection and disclosure of information*, available on the ACCC website.